IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-990

SPERRY RAND CORPORATION,
A Delaware Corporation,
Petitioner,

—versus—

A-T-O, INC. (formerly "AUTOMATIC" SPRINKLER CORPORATION OF AMERICA); an Ohio Corporation, ELECTRONIC CONCEPTS, INC., a Virginia Corporation, JOHN E. ZENTMEYER, JR., and GUS K. TEBELL, JR.,
Respondents.

PETITIONER'S REPLY BRIEF

LEWIS T. BOOKER
HUNTON, WILLIAMS, GAY and GIBSON
700 East Main Street
Richmond, Va. 23212

FRANCIS J. McNAMARA, JR.
JOHN S. McGEENEY
RIDGWAY M. HALL, JR.
CUMMINGS & LOCKWOOD
One Atlantic Street
Stamford, Conn. 06904

Counsel for Petitioner

TABLE OF CONTENTS

	PAGE
PREMATURITY	1
CONFLICT AMONG THE CIRCUITS	3

TABLE OF CASES

Braniff Airways v. *Curtis-Wright Corp.*, 424 F. 2d 427 (2nd Cir. 1970), cert. den. 400 U. S. 829 (1970)	2
Cleveland v. *Second Nat. Bank & Trust Co.*, 149 F. 2d 466 (6th Cir. 1945), cert. den. 326 U. S. 775 (1945)	3
Department of Banking v. *Pink*, 317 U. S. 264 (1942)	2
First National Bank & Trust Co. v. *Village of Skokie*, 190 F. 2d 791 (7th Cir. 1951), cert. den. 342 U. S. 909 (1952)	4
F. T. C. v. *Minneapolis-Honeywell Co.*, 344 U. S. 206 (1952)	1, 2
Sprague v. *Ticonic National Bank*, 307 U. S. 161 (1939)	3
United States v. *Adams*, 383 U. S. 39 (1965)	2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-990

SPERRY RAND CORPORATION,
A Delaware Corporation,
Petitioner,

v.

A-T-O, INC. (formerly "AUTOMATIC" SPRINKLER CORPORATION OF AMERICA), an Ohio Corporation, ELECTRONIC CONCEPTS, INC., a Virginia Corporation, JOHN E. ZENTMEYER, JR., and GUS K. TEBELL, JR.
Respondents.

PETITIONER'S REPLY BRIEF

PREMATURITY

The question of prematurity raised by the respondents is not jurisdictional. 28 U. S. C. § 1254(1) permits certiorari "before or after rendition of judgment or decree." The Court therefore is called upon to exercise its discretion in determining whether issuance of the writ at the present time is consistent with good appellate practice. This involves a balancing of the principle that litigation must at some point be brought to an end with the Court's policy of discouraging piecemeal review. See *F. T. C.* v. *Minneapolis-Honeywell Co.*, 344 U. S. 206, 213 (1952).

Judgment in this case was entered in the Court of Appeals on September 7, 1971. The petitions for rehearing* involve two separate and distinct questions relating to damages. They do not involve the issue of liability, and they have no connection whatever with the issue of attorneys' fees which is the subject of this petition for certiorari. While a Court of Appeals always has the power to modify its judgment, (*Braniff Airways* v. *Curtis-Wright Corp.*, 424 F. 2d 427 (2nd Cir. 1970), cert. den. 400 U. S. 829 (1970), cited by respondents), there is no reason to believe that the court below will on its own motion exercise this power to reverse itself on the question of attorneys' fees. The existence of this open-ended power has never been held to affect the time for filing a petition for certiorari.

There is authority to the effect that a timely petition for rehearing extends the time for filing a petition for certiorari. *E.g., Department of Banking* v. *Pink*, 317 U. S. 264, 266 (1942) [dictum]; *F. T. C.* v. *Minneapolis-Honeywell Co.*, *supra*, [by implication]. However, so far as we are aware, this Court has never decided whether a petition for rehearing on one issue tolls the ninety-day period on a separate and unrelated issue which cannot be affected by the outcome of the petition for rehearing.

Moreover, in *United States* v. *Adams*, 383 U. S. 39, 41-2 (1965) in holding that a motion to amend the judgment with respect to one of two issues extended the time for certiorari on the other, this Court expressly relied on the fact that the two issues were "inextricably linked." In the present case there is no link whatever between the issue

*Copies of the petitions for rehearing are annexed as Exhibits C and D to petitioner's motion for extension of time herein (No. A-514) dated November 12, 1971. Contrary to respondents' statement that the court below "granted timely rehearing motions by both parties," (Resp. to Pet. p. 2), rehearing has neither been granted nor denied. Sperry's petition for rehearing was timely; respondents' was 10 days late.

in the petition for certiorari and the two damage questions involved in the petitions for rehearing. Indeed *Sprague* v. *Ticonic National Bank*, 307 U. S. 161, 168 (1939), holds that the award of attorneys' fees is not part of the relief encompassed within the mandate of the judgment on the merits but is a separate and distinct item of costs.

Whatever the Court may conclude with respect to whether a petition for rehearing tolls the period for seeking certiorari on unrelated issues, there is no need to declare any petition for certiorari under 28 U. S. C. 1254 (1) premature unless there is some reason to believe that it may be affected by further proceedings in the court below.

CONFLICT AMONG THE CIRCUITS

Respondents attempt to dismiss with a wave of the hand five Court of Appeals decisions, all in diversity cases, all applying federal law, and all awarding attorneys' fees or other extraordinary costs on the authority of *Sprague*.

It is apparently now their position that federal law may govern the award of counsel fees in *some* diversity cases but state law governs the award of "counsel fees in a diversity tort action." (Resp. to Pet. p. 9). They also suggest that these five decisions can be distinguished on the ground that the "plaintiff, as a party to a fiduciary relationship, [had] created or protected a trust fund for the benefit of a class, and fees [were] awarded as a lien on the fund". (Resp. to Pet. p. 7-8.)

To the best of our knowledge no federal court has ever made or even suggested that the choice between federal or state law turns on either distinction. In *Cleveland* v. *Second Nat. Bank & Trust Co.*, 149 F. 2d 466 (6th Cir. 1945), cert. den. 326 U. S. 775 (1945), the court expressly stated (149 F. 2d at 469) that *Sprague* was not limited to cases involving a fund, but included the power to assess

litigation expenses against a defeated party in an extraordinary case. In *First National Bank & Trust Co.* v. *Village of Skokie*, 190 F. 2d 791 (7th Cir. 1951) cert. den. 342 U. S. 909 (1952), the fees and expenses of the court appointed master and auditor were charged entirely against the unsuccessful defendant trustee as costs because of its failure to keep accurate and adequate records, 190 F. 2d at 796. Nothing in the case supports respondents' claim that these costs were "payable from sinking fund on sewer bonds." (Resp. to Pet. p. 8).

Respondents' attempt to gloss over the conflict among the circuits does not withstand even casual scrutiny. Indeed, the inadequacy of their effort to harmonize these cases serves to emphasize the real confusion that surrounds this problem. We submit that it is ripe for consideration by this Court.

Respectfully submitted,

FRANCIS J. MCNAMARA, JR.
LEWIS T. BOOKER
JOHN S. MCGEENEY
RIDGWAY M. HALL, JR.
Counsel for Petitioners

March 21, 1972